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No. 80-2138

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

IRIS CARTER,

Petitioner,

v.

DAYTON BOARD OF EDUCATION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

1. Whether Title IX of the Education Amendments of 1972, Title 20 U.S.C. § 1681, applies to claims of sex-based employment discrimination.

2. Whether the lower court accurately analyzed the facts of this case under the allocation of burdens and order of presentation of proof in a Title VII disparate treatment case, as set forth by this Court in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), and as clarified in *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567 (1978), *Board of Trustees* v. *Sweeney,* 439 U.S. 24 (1978), and *Texas Department of Community Affairs* v. *Burdine,* —— U.S. ——, 101 S.Ct. 1089 (1981).

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BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI

Respondents, Dayton Board of Education and John B. Maxwell, respectfully pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment entered in this case on March 17, 1981, be denied.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are Section 901 (a) of Title IX of the Education Amendments of 1972, Title 20 U.S.C. § 1681 (a), cited at pages 2 through 5 of the Petition, and Section 703 (a) of Title VII of the Civil

Rights Act of 1964, as amended, Title 42 U.S.C. § 2000e-2 (a), cited at pages 5 and 6 of the Petition.

STATEMENT OF THE CASE

The Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) in the summer of 1974, alleging sex discrimination in employment by the Dayton Board of Education as a result of its failure to appoint her to the position of elementary principal. The Department of Justice issued a right to sue letter to the Petitioner on September 23, 1977, and Complaint was filed on December 23, 1977, containing both individual and class action allegations of discriminatory employment practices on the part of the Respondents. The Court's jurisdiction was invoked under Title VII of the Civil Rights Act of 1964, as amended, Title 42 U.S.C. § 2000e, et seq., and under Title IX of the Education Amendments of 1972, Title 20 U.S.C. § 1681. The Petitioner amended her Complaint on March 24, 1978, deleting the class action allegations, and the Court dismissed the Title IX allegations in an order entered June 21, 1978.

The case was tried to United States Magistrate Robert A. Steinberg on November 6 and 7, 1978. The single issue was whether the Petitioner was denied appointment to the position of elementary principal because of her sex. The Report and Recommendation of the Magistrate was filed on February 14, 1979, recommending that judgment be entered in favor of the Respondents. Petition, A. 8-35. After a review upon motion of the Petitioner, the United States District Court for the Southern District of Ohio accepted the Magistrate's recommendation and dismissed the Petitioner's Complaint. Petition, A. 6-7. The Petitioner

appealed to the Sixth Circuit Court of Appeals, and judgment affirming the decision of the District Court was entered on March 17, 1981. Petition, A. 1-4.

REASONS FOR DENYING THE WRIT

I. There is no novel Title IX issue presented by this case, nor would a decision that Title IX applies to claims of sex-based employment discrimination alter the result in this case.

Petitioner presents a twofold argument in support of her contention that a writ of certiorari should be granted in this case as a result of the dismissal of the Title IX claim in the courts below. First, the Petitioner states that the Court has granted petitions for certiorari in two cases involving the question of whether § 901 (a) of the Education Amendments of 1972 (Title IX) applies to claims of employment discrimination on the basis of sex in federally funded educational programs. *Seattle University* v. *H.E.W.*, 621 F.2d 992 (9th Cir. 1980), *cert. granted*, — U.S. —, 101 S.Ct. 563 (1980); *North Haven Board of Education* v. *Hufstedler*, 629 F.2d 773 (2d Cir. 1980), *cert. granted*, — U.S. —, 101 S.Ct. 1345 (1981). The Petitioner argues that the decision in those cases will affect the outcome of the instant case, and thus the Petitioner seeks deferral of a decision in this case pending a ruling in *Seattle University* and *North Haven*. Second, the Petitioner contends that the petition in this case presents a supplemental issue to those in the *Seattle University* and *North Haven* cases, with respect to whether a private right of action exists under Title IX for the redress of gender-based employment discrimination. On that basis, the Pe-

titioner asks this Court to consider this case with those already pending before it. Neither ground upon which certiorari is sought is sufficient. Resolution of the *Seattle University* and *North Haven* cases in favor of application of Title IX to claims of sex-based employment discrimination would not alter the result in the instant case. In addition, the Supreme Court has already decided the so-called "supplemental issue" concerning the existence of a private right of action under Title IX in *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979).

No useful purpose would be served in this case by deferring ruling pending determination of the *Seattle University* and *North Haven* cases. Assuming for the sake of argument that the Court decides in *Seattle University* and *North Haven* that Title IX applies to sex-based claims of employment discrimination, there would be no difference in outcome of the instant case. Plaintiff's Complaint alleged violations of both Title VII and Title IX. Although the Title IX aspect was dismissed, the case was tried on its merits under Title VII, and judgment was entered in favor of Respondents. If the Petitioner could not satisfy the burden of proof under Title VII, neither could she satisfy the Title IX burden of proof. On remand from the Supreme Court, the District Court in *Cannon* v. *University of Chicago,* — F.Supp. —, 26 EPD ¶ 31,822 (N.D.Ill. 1981), held that Title IX, like Title VI, proscribes only those classifications that would violate the Equal Protection Clause of the Fifth Amendment, and therefore, a violation of Title IX would require a finding of intentional discrimination. Likewise, the third prong in the tripartite allocation of burdens and order of presentation of proof in a case alleging discriminatory treatment under Title VII requires that the plaintiff persuade the court that she was the "victim of intentional discrimination." *Texas*

Department of Community Affairs v. *Burdine,* — U.S. —, 101 S.Ct. 1089, 1096 (1981). This the Petitioner was unable to do in the courts below. There is, therefore, no reason to defer ruling on this case pending determination of the *Seattle University* and *North Haven* cases.

In *Cannon* v. *University of Chicago,* 411 U.S. 677 (1979), this Court resolved the issue of whether a private right of action exists under Title IX. *Cannon* involved an applicant for admission to medical school who contended she was denied admission because she was a woman. Title IX does not expressly authorize a private right of action by a person claiming to be aggrieved under that statute. In determining that a private right of action can properly be implied under Title IX, the Court restated the factors set forth in *Cort* v. *Ash,* 422 U.S. 66, 78 (1975).

1. Does the statute create a federal right in favor of the plaintiff?
2. Is there any explicit or implicit indication of legislative intent to create such a remedy or to deny one?
3. It is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?
4. Is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

The Court, after discussion of these factors in the Title IX context, concluded that a private right of action exists for students claiming discrimination in admissions on the basis of sex. The issue which remains undecided is whether employees, as well as students, are members of the class for whose especial benefit Title IX was enacted. That is-

sue, the first of the *Cort* tests, will necessarily be resolved in the *Seattle* and *North Haven* cases. If Title IX reaches employment discrimination in federally funded education programs, then on the basis of *Cannon,* employees as well as students would have a private right of action under that statute. There is, thus, no novel issue presented by the instant case which militates in favor of issuance of a writ of certiorari.

II. The decision of the lower court is fully consistent with this Court's decisions concerning the burden of proof in a single plaintiff Title VII case.

This Court announced a three-pronged approach to the allocation of burdens and order of presentation of proof in a Title VII disparate treatment case, in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). The initial burden is on the plaintiff to establish a prima facie case of discrimination. Although the specifics of the burden vary under differing factual situations, the burden was held to be satisfied in the instant case by a showing (i) that the Plaintiff is a female; (ii) that she applied for and was qualified for a job for which the employer was seeking applicants; (iii) that despite her qualifications, she was rejected; and (iv) a male was ultimately selected. This Court described the Plaintiff's initial burden in *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 576 (1978), as follows:

> [A] Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'

The second prong of the *McDonnell-Douglas* approach would then shift the burden of production to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 U.S. at 802. *Furnco* made it clear that this obligation is not absolute, but rather that the employer need only show that its actions or procedures are reasonably related to the achievement of some legitimate purpose. 438 U.S. at 578. *See also Board of Trustees* v. *Sweeney*, 439 U.S. 24, 25 (1978). This Court further explained the nature of the employer's burden in *Texas Department of Community Affairs* v. *Burdine*, — U.S. —, 101 S.Ct. 1089, 1095 (1981), as follows:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . [citation omitted]. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.

The lower court held that the employer had met this burden of production in the instant case, resulting in a rebuttal of the presumption raised by the Plaintiff's prima facie case. Since the burden of persuasion remains at all times on the plaintiff, following the employer's articulation of a nondiscriminatory reason for the Plaintiff's rejection, the Plaintiff then must have an opportunity to demonstrate that the reason stated by the employer was not the true reason for the employment decision. According to *Burdine*, "this burden . . . merges with the ultimate burden of persuading the court that [the plaintiff]

has been the victim of intentional discrimination." —— U.S. ——, 101 S.Ct. at 1096. It was this burden which the Petitioner failed to meet. A review of the evidence failed to persuade the trier of fact, and two reviewing courts, that the Petitioner herein was the victim of intentional discrimination.

A. The Claimed Factual Errors Relating to Pretext

The Petitoner cites examples of what it considers to be factual errors in the opinions of the courts below, which it contends hampered the Petitioner's ability to prove pretext. A review of those examples clearly shows the misleading nature of the Petitioner's argument. In Finding of Fact No. 21, the Magistrate stated that the "Plaintiff testified that two of her transfers resulted from a desire of the Maxwell administration to equalize the racial balance of the Dayton school system." Petitioner, A. 16. The Petitioner argues that this finding is contrary to the evidence because whites were promoted to elementary principalships in 1974. The Petitioner fails to recognize that the Magistrate was not talking about promotions in the disputed finding. Neither was he stating a reason articulated by the Defendants to explain why the Plaintiff was not promoted. The Magistrate was merely restating testimony elicited from the Petitioner at the trial concerning her employment history with the Dayton Public Schools. The Petitioner testified that she "was the wrong color *again* at Valerie and [she] was transferred." [Emphasis Supplied] Transcript, p. 35. The Petitioner further testified that "Dr. Fields, the principal at Valerie School, told me that all three people basically in the office at that building were white. He was white, I was white, and the secretary was white, and I had to be transferred because of that factor of being white." Transcript, p. 36. Since this tes-

timony was not directed at proffered reasons for the Respondents' failure to promote the Petitioner, there can be no claim of error with respect to any failure to consider it in the context of pretextuality.

In Finding of Fact No. 27, the Magistrate listed the women who were promoted during the Maxwell Administration. Petition, A. 18. The Petitioner engages in a substantively meaningless exercise concerning whether the 27 women listed were "initially appointed" or "promoted." The record, on the other hand, clearly shows that John Maxwell was involved in the placement of the women listed to the positions stated. Transcript, pp. 235-42. While Petitioner states that Mr. Maxwell filled twenty principalships with men, the record reflects that during the relevant time period, only four promotions were made to elementary principal, the position sought by the Petitioner. No conclusions can be drawn from such a small number of employment decisions. *See Mayor of Philadelphia* v. *Educational Equality League,* 415 U.S. 605, 621 (1974); *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 340 (1977). The evidence presented to the court below simply does not give rise to any conclusion that Mr. Maxwell was opposed to promotions of women to the position of elementary principal. There is, then, no conflict as asserted by the Petitioner, which if resolved would aid the Petitioner in meeting her burden of persuasion in this case.

The Magistrate stated a number of reasons why the Maxwell Administration did not appoint the Petitioner to the position of elementary principal. Petition, A. 23. The Petitioner's educational philosophy was vastly different from that of Mr. Maxwell, and the two differed on approaches to discipline. The Magistrate also stated that Mr. Max-

well "had been informed that Dr. Graham had taken unfavorable information out of her file" and Mr. Maxwell had been told of problems the Petitioner had with discipline of students. The Petitioner, for some inexplicable reason, asserts that the Magistrate sustained objections to testimony concerning the latter two statements. The following excerpts from the transcript belie that assertion.

> MR. MAXWELL: . . . At Westwood Elementary School, Mr. Waller informed me that Dr. Graham had stripped the files of the documentation which he placed in there asking for her to be transferred.
>
> MR. GUERRIER: Objection, Your Honor.
>
> THE COURT: On what basis?
>
> MR. GUERRIER: Hearsay. He's saying Dr. Waller had informed him that somebody had informed him.
>
> THE COURT: Is this offered to prove the truth of the statement or the fact that somebody had informed him?
>
> MR. NEALE: The fact that he received the information.
>
> THE COURT: If it's offered to prove that was said and he heard it, it's admissible. It will not be considered for the truth of the matter but merely that Mr. Maxwell was so informed. Transcript, p. 244.
>
> * * *
>
> MR. MAXWELL: . . . [W]hen she was the assistant or principal really at Shiloh when the principal became ill, according to the principal, Mrs. Bullock, the following year the teachers informed her that she had many, many problems in the lunchroom, and the students were giving her a

> rough time and that the teachers had to be called in to try to solve the problem there.
>
> MR. GUERRIER: Objection, Your Honor.
>
> THE COURT: The ruling will be the same. It will only be considered for the fact that the statement was made to Mr. Maxwell. Transcript, p. 245.

In fact, the Magistrate considered the evidence exactly as he said he would. The testimony was offered to show Mr. Maxwell's probable state of mind, and it was admissible to shed light on the reasonableness and good faith of his judgment and subsequent conduct. *See* 6 Wigmore, *Evidence,* § 1790 (3d ed. 1940); McCormick, *Handbook of the Law of Evidence,* § 228 (1954). The law does not protect the Petitioner from an evaluation of her performance based on hearsay. None of the feedback received by Mr. Maxwell concerning the Petitioner contained even a hint of impermissible sex considerations. Based on all of the information available to him, Mr. Maxwell simply believed other eligible persons to be more qualified, and this feedback information provides substance to the nonpretextual nature of his legitimate business judgment.

B. The Claimed Evidentiary Errors

The Magistrate recommended and the lower court held that the statistical exhibits presented by both parties at the trial of this action were of no evidentiary value. Petition, A. 25-32. Three reasons were stated in support of that recommendation. First, the two groups of employees which were statistically compared were inappropriate. Second, the reliability of the underlying exhibits had not been established. Third, there had been too few promotion decisions made during the relevant time period in order for the statistics to have any predictive value. For

the first time, the Petitioner is contending that certain of those exhibits were prepared by the Respondents in response to an investigation conducted by the EEOC and HEW. The Petitioner further contends that certain of the exhibits were prepared by the Respondents for trial, and that there were inconsistencies between the latter and those submitted to the EEOC and HEW. The Petitioner argues that such inconsistencies could form the basis for a finding of pretextuality, citing *Burdine,* — U.S. —, 101 S.Ct. at 1096. The Petitioner cites no record support for these bald factual assertions, for indeed none exists. No evidence was presented concerning when, how or why the joint exhibits in question were prepared. This in part formed the basis for the Magistrate's rejection of them. There is not one mention in the entire record of what documents were submitted to the EEOC or HEW. Such inventive albeit futile attempts by the Petitioner to square the facts of this case with the teachings of *Burdine* should not be countenanced.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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